Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1132

MICHAEL IRVIN CANON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. THE DISTRICT COURT SHOULD HAVE GRANTED CANON'S MOTION FOR A PROTECTIVE ORDER PRIOR TO ORDERING CANON TO TESTIFY	8
II. THE DISTRICT COURT SHOULD HAVE INSTRUCTED THE GOVERNMENT TO COMPLY WITH TITLE 18 U.S.C. § 3504 AND GIVEN PETITIONER AN OPPORTUNITY TO FACIALLY CHALLENGE ANY ELECTRONIC SURVEILLANCE	11
III. THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF THE GOVERNMENT'S UNTIMELY AFFIDAVIT PURSUANT TO TITLE 18 U.S.C. § 3504	14
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases:

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)	10
Droback v. United States, 509 F.2d 625 (9th Cir., 1974); cert. denied, 95 S.Ct. 1952	12,13

	Page
Gelbard v. United States, 408 U.S. 41 (1972)	11
Goldberg v. Kelly, 397 U.S. 254 (1970)	13
Goldberg v. United States, 472 F.2d 513, 516 n.5 (1973)	9
In re Lochiatto, 497 F.2d 803 (1974)	12,14
In re Quinn, 525 F.2d 222 (1st Cir., 1975)	14
In re Weir, 377 F.Supp. 919, 520 F.2d 662 (9th Cir., 1975)	9,10
In the Matter of Persico, 491 F.2d 1156 (1974)	12,14
Kastigar v. United States, 406 U.S. 441 (1972)	8,9,10
Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)	10
United States v. Alter, 482 F.2d 1016 (9th Cir., 1973)	13
United States v. Bellosi, 501 F.2d 833 (D.C. Cir., 1974)	15
United States v. Dinsio, supra, 468 F.2d at 1394	13
Constitution of the United States:	
Fifth Amendment	6
Miscellaneous:	
Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171 (1972)	9
Statutes:	
18 U.S.C. § 1826(a)	13
18 U.S.C. § 2510(5)	4
18 U.S.C. § 2515	2,11,12,14
18 U.S.C. § 2518	3
18 U.S.C. § 2518(1)(e)	14
18 U.S.C. § 3504	2,4,7,11,14
18 U.S.C. § 6002	4,8
28 U.S.C. § 1254(1)	2

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Petitioner MICHAEL IRVIN CANON respectfully prays that a Writ of Certiorari issue to review the memorandum order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 12, 1976.

OPINION BELOW

The memorandum order of the United States Court of Appeals for the Ninth Circuit was filed on January 12, 1976. This memorandum and order has not been reported and is reproduced herein as Appendix "A".

JURISDICTION

The memorandum order of the United States Court of Appeals for the Ninth Circuit, entered on January 12, 1976, directed that no petition for rehearing may be filed,[1] and directed the mandate issue twenty-one (21) days from January 12, 1976. On January 26, 1976 a timely motion to stay the issuance of the mandate was filed in the United States Court of Appeals for the Ninth Circuit and said motion was granted providing a petition for writ of certiorari is filed by February 11, 1976. This Court's jurisidiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court should have granted CANON'S motion for a protective order prior to ordering CANON to testify.

2. Whether the District Court should have instructed the Government to comply with Title 18 U.S.C. § 3504 and given CANON an opportunity to facially challenge any electronic surveillance.

3. Whether the Court of Appeals should have remanded the case to the District Court for reconsideration in light of the Government's untimely affidavit pursuant to Title 18 U.S.C. § 3504.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications.

[1] Appendix, pages 1a-2a.

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2518. Procedure for interception of wire or oral communications.

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> * * *
>
> (e) a full and complete statement of the facts concerning all previous applications known to the

individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

* * *

18 U.S.C. § 3504. Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States–

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

* * *

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

18 U.S.C. § 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to–

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a

subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

On November 7, 1975, Petitioner was served with a subpoena directing him to appear and testify before a Federal Grand Jury sitting in the District of Nevada at Las Vegas, Nevada. The subpoena directed Petitioner to appear on November 13, 1975; however, with consent of the Government attorney Petitioner's appearance was postponed until November 20, 1975.

Petitioner appeared before the Grand Jury on November 20, 1975, gave his name and declined to answer further questions, asserting his privilege against self-incrimination. Petitioner was then excused and directed to return on November 26, 1975.

On November 26, 1975, Petitioner returned to the Grand Jury and again declined to answer questions for the same reasons. That same day, Petitioner was served with an Order of Immunity signed by the Honorable ROGER D. FOLEY, District Judge (R.Vol.I. pp. 10-11). Petitioner was then directed to return to the Grand Jury on December 4, 1975.

The Government filed on November 28, 1975, a motion requesting the Court to direct Petitioner to answer questions and a notice of intent to seek a contempt order should he still decline to answer (R.Vol.I. pp. 12-15).

Prior to Petitioner reappearing before the Grand Jury he filed a motion for protective order (R.Vol.I. pp. 22-26) and a memorandum in opposition to a contempt hearing (R.Vol.I. pp. 17-21).

Petitioner again, on December 4, 1975, declined to answer questions, responding instead as follows:

> "I will respectfully to [sic] refuse to answer on the grounds of the Fifth Amendment even though an immunity order has been entered, and the immunity order does not conform to the application of immunity, and that the Court has not ruled on my motion for protective order, and these questions resulted from unlawful electronic surveillance." (R.Vol.II. p. 10).

The above answer was read to Judge FOLEY by the Grand Jury stenographer at a hearing on the Government's application for a contempt order. At that hearing, Judge FOLEY considered the arguments of counsel relative to Petitioner's motion for a protective order. The motion was taken under submission (R.Vol.II. p. 49) and the matter was recessed until December 5, 1975.

On December 5, 1975, Petitioner's motion for a protective order was denied in its entirety (R.Vol.II. p. 51) and Petitioner was directed to return to the Grand Jury (R.Vol.II. p. 52). Petitioner again declined to answer questions before the Grand Jury and he was then returned to Court at which time CANON was held in contempt.

During the contempt hearing on December 5, 1975, CANON again raised a claim pursuant to Title 18 U.S.C. § 3504 and requested the Government be directed to comply with that Section (R.Vol.II. p. 79). This request was denied.

CANON'S notice of appeal was filed December 12, 1975 (R.Vol.I. p. 52).

Subsequent to December 12, 1975, the Government *ex-parte* filed on December 19, 1975 an affidavit entitled "Affidavit of RICHARD A. WRIGHT, Assistant United States Attorney, In Accordance With Title 18, United States Code, Section 3504." (R.Vol.I. pp. 61-67). That affidavit alleges a series of court authorized wiretaps in which CANON was intercepted. It appears from that affidavit that Petitioner was named as a subject in two of the four authorization orders, those being November 22, 1974, in the Northern District of Alabama, and October 24, 1975, in the District of Nevada; the latter being a source of information upon which the questions asked of Petitioner before the Grand Jury were based.

Petitioner argued before the United States Court of Appeals for the Ninth Circuit that the "affidavit" be stricken from the record on appeal since it was not timely filed in the District Court and that the matter should be remanded to the District Court for reconsideration in light of the "affidavit" which was not before the District Court when Petitioner was held in contempt. The Court of Appeals declined to do so.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT SHOULD HAVE GRANTED CANON'S MOTION FOR A PROTECTIVE ORDER PRIOR TO ORDERING CANON TO TESTIFY.

Subsequent to the Order of Immunity which was entered on November 26, 1975, Petitioner filed a motion for protective order which requested, *inter alia*:

> "That the Government be required to certify to this Court in writing a detailed outline of any incriminating evidence against Michael Irvin Canon which the Government has in its possession prior to this Court's compelling Canon to testify; it is suggested that the Court seal the certification of evidence subject to further order of the Court." (R.Vol.I. p. 22).

Title 18 U.S.C. § 6002 states that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony) may be used against the witness in any criminal case." In *Kastigar v. United States*, 406 U.S. 441 (1972) the Supreme Court held that once an indicted witness shows that he or she has been compelled to testify under a grant of immunity, the Government bears the burden of proving that its evidence is not tainted by establishing an entirely independent and legitimate basis for it.

Despite the fact that the *Kastigar* Court termed the imposition of such a burden "very substantial protection", 406 U.S. at 461, it is submitted that the precautionary step of certification of evidence by the

Government be taken to insure that any immunized and compelled testimony of a witness will in no way contribute to a criminal prosecution against him.

If this precautionary measure is not taken, the proof problems surrounding subsequent use of immunized testimony may be very great. The concern that impermissible use of immunized testimony may not be uncovered was clear in both the majority and dissenting opinions in *Kastigar, supra.*

The prohibition on subsequent use of immunized testimony should not be limited to evidence introduced at trial. *Kastigar, supra,* forbids the use of compelled testimony "in any respect". 406 U.S. at 453. The *Kastigar* Court specifically stated that "the use of compelled testimony as an investigatory lead; and also . . . the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures" was barred. 406 U.S. at 460.

The precautionary step stated above was suggested in "Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli", 82 Yale L.J. 171 (1972) as one means of insuring full protection of an immunized witness. Such a procedure has been employed by at least one district court in the Ninth Circuit when Judge TURRENTINE ordered certification of evidence *in camera*. *In re Weir*, 377 F.Supp. 919, 520 F.2d 662 (9th Cir., 1975). Additionally, the Second Circuit has suggested that certification of evidence is an appropriate means of protecting both the Government and a defendant prior to the compulsion of testimony. *Goldberg v. United States*, 472 F.2d 513, 516 n.5 (1973).

Secondly, Petitioner in his motion for protective order sought an order prohibiting the Government from

seeking an indictment against Petitioner from the same Grand Jury he was ordered to give testimony to. (R.Vol. I. p. 22). This request was also denied.

It is submitted that such a precaution is necessary for the reason that once a Grand Jury hears incriminating testimony from a witness, there is no way that the Grand Jury can ignore it, that is, not "use" the witness' testimony against him in a decision to indict the witness.

Petitioner's concern in this regard was discussed in *Goldberg v. United States, supra,* wherein the Court stated:

> "We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such an indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their minds, *cf.* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case,' *cf.* Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), in defiance not only of 18 U.S.C. § 6002 but of the command of *Kastigar* that the immunity must be 'coextensive with the scope of the privilege.' 406 U.S. at 449, 92 S.Ct. at 1664. But the Government represented to us in open court that the grand jury before which Goldberg has been directed to answer questions will not be asked to indict him." 472 F.2d at 516.

Petitioner asserts that the safeguards discussed herein should have been implemented by the District Court prior to Petitioner's having to make the difficult decision to testify or suffer the consequences which have been imposed upon him.

II.

THE DISTRICT COURT SHOULD HAVE INSTRUCTED THE GOVERNMENT TO COMPLY WITH TITLE 18 U.S.C. §3504 AND GIVEN PETITIONER AN OPPORTUNITY TO FACIALLY CHALLENGE ANY ELECTRONIC SURVEILLANCE.

Petitioner asserted a claim of unlawful electronic surveillance in both his written objection to a contempt hearing (R.Vol. I. p. 18) and orally during the contempt hearing (R.Vol. II. p. 75). The District Court, however, refused to direct the Government to respond in compliance with Title 18 U.S.C. § 3504 which provides, *inter alia:*

> "(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States–
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; . . ."

The prohibition of Title 18 U.S.C. § 2515 is available to a subpoenaed and immunized grand jury witness in defense of a contempt citation. *Gelbard v. United States,* 408 U.S. 41 (1972).

The Court of Appeals for the First Circuit has ruled that in order to give effect to the prohibition of Title 18 U.S.C. § 2515 in a court authorized wiretap situation, a witness is entitled to an opportunity for inspection of the following limited materials: the authorization of the Attorney General or his designate, the affidavits in support of the court order, the court order, and an affidavit from the Government as to length of time the surveillance was conducted. *In re Lochiatto*, 497 F.2d 803 (1974). The limited review permitted by *Lochiatto* is not the type of "full-blown suppression hearing" with which the Second Circuit Court of Appeals was concerned about in *In the Matter of Persico*, 491 F.2d 1156 (1974).

The Government relied below on *Droback v. United States*, 509 F.2d 625 (9th Cir., 1974); *cert. denied*, 95 S.Ct. 1952, wherein the Court held that an immunized witness was not entitled to a "full-fledged suppression hearing" to question the validity of a court ordered wiretap. Unfortunately, the printed opinion does not set forth the facts in *Droback*. However, a review of Droback's reply brief, filed in the Ninth Circuit points out two distinguishing factors between that case and the instant case. First, Droback, prior to his immunization, had been dismissed by the Government from the pending indictment, and secondly, Droback had already lost his wiretap suppression motion in connection with the indictment.

Finally, it should be pointed out that in *Droback* the Court viewed the situation as one in which Droback was "seeking to convert his contempt proceeding into a bystander's action to test the legality of a surveillance program which is likely to produce evidence against one or more of his associates." 509 F.2d at 626. Such is not the situation herein.

In the instant case, Petitioner was a target defendant of the Grand Jury's investigation (R.Vol. II. p. 10) and unlike *Droback*, there has been no prior determination of the legality of the wiretap.

It is respectfully submitted that Petitioner is entitled to a review of the underlying wiretap materials. Furthermore, adequate time to review said documents and prepare a defense to a contempt citation is mandated by the guarantee of due process as stated in *United States v. Alter*, 482 F.2d 1016 (9th Cir., 1973); wherein the Court citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), said:

> "Moreover, the hearing Alter received was not the 'uninhibited adversary hearing' contemplated by section 1826(a). (United States v. Dinsio, supra, 468 F.2d at 1394). The hearing was largely confined to the perfunctory reception of affidavits, a round of oral argument, and some offers for the record. That 'uninhibited adversary hearing' recognized by Harris and most recently reaffirmed by Dinsio requires, at the very least, that a witness be allowed to probe all nonfrivolous defenses to the contempt charge. The constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues. 'The fundamental requisite of due process of law is the opportunity to be heard' . . . The hearing must be 'at a meaningful time and in a meaningful manner.' " 482 F.2d at 1024.

III.

THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF THE GOVERNMENT'S UNTIMELY AFFIDAVIT PURSUANT TO TITLE 18 U.S.C. § 3504.

Notwithstanding the failure to do so in the District Court prior to Petitioner being held in contempt, the Government felt compelled to file an affidavit pursuant to Title 18 U.S.C. § 3504, even though not timely. Petitioner contends that the Court of Appeals should have remanded the matter to the District Court for reconsideration and at the very least, an in camera facial review of the October 24, 1975 wiretap materials in view of the Government's statement that Petitioner had in fact been the subject of a prior electronic surveillance authorization order. *In the Matter of Persico*, 491 F.2d 1156 (2nd Cir., 1974); *In re Quinn*, 525 F.2d 222 (1st Cir., 1975).

Without the opportunity to examine the limited wiretap materials, *Lochiatto, supra*, or at least an in camera review, *Persico, supra*, the restriction of Title 18 U.S.C. § 2515 has no meaning.

For example, in light of the Government's untimely disclosure that Petitioner was named in a prior order authorizing electronic surveillance, did the application submitted to Judge FOLEY, which resulted in his authorization order of October 24, 1975, meet the requirements of Title 18 U.S.C. § 2518(1)(e)? That Section requires that:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the Judge on each such application; . . ."

If the Government failed to comply with this section then the electronic surveillance conducted on Petitioner pursuant to the order of October 24, 1975 was "unlawful". *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir., 1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this 9th day of February, 1976, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

DOUGLAS G. CROSBY, ESQ.

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL IRVIN CANON, *Defendant-Appellant.*	No. 75-3811 MEMORANDUM

[January 12, 1976]

Appeal from the United States District Court
for the District of Nevada

Before: CHAMBERS, DUNIWAY, and SNEED, Circuit Judges.

An immunized witness, Canon, appeals from an order of the District Court holding him in contempt for refusing to comply with an order that he answer certain questions put to him as a witness before a grand jury, and committing him to the custody of the Attorney General until he purges himself of the contempt or until the life of the grand jury expires.

Canon's motion to strike from the record on appeal an affidavit filed by the government in the District Court on December 19, 1975, seven days after the Notice of Appeal was filed, and fourteen days after entry of the order appealed from, is granted. The affidavit was not before the District Court when it made its order and, therefore, is not a proper part of the record on appeal. We express no opinion as to the significance or effect of the affidavit in the District Court.

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The law does not require that the District Court make the type of protective order or orders that Canon asked for, although the Court, in its discretion, could have done so. *Cf. Goldberg v. United States,* (2nd Cir. 1973) 472 F.2d 513, 516, n. 5; *In re Weir,* (S.D. Cal. 1974) 377 F. Supp. 919, *aff'd.* (9th Cir. 1975) 520 F.2d 662.

Our reading of the record, and particularly the colloquy between counsel and the judge at Tr. pp. 80-2, leads us to agree with the District Judge that no sufficient claim of illegal surveillance was made under Title 28 U.S.C. Sec. 3504. *See United States v. See,* (9th Cir. 1974) 505 F.2d 845. As to the attack upon the Court-authorized electronic surveillance of Canon, he is not permitted, as a recalcitrant witness, to delay the grand jury proceeding while he litigates the question of the validity of the surveillance. *Droback v. United States,* (9th Cir. 1974) 509 F.2d 625; *In re Persico,* (2nd Cir. 1974) 491 F.2d 1156. We have not followed *In re Lochiatto,* (1st Cir. 1974) 497 F.2d 803. *See Droback, supra.*

The order appealed from is affirmed. No petition for a rehearing may be filed. The mandate will issue 21 days after the filing of this Memorandum.